UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BALLY'S PARK PLACE, INC. d/b/a
BALLY'S ATLANTIC CITY

v. Case 4–CA–35304

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW

William Slack, Esq., (Region 4, NLRB)
of Philadelphia, PA, for the General Counsel

Charles E. Sykes, Esq., (Sandler and Sykes)
of Huston, TX, for the Charging Party

Gerald E. Einsohn, Esq., (Harrah's Entertainment, Inc.)
of Las Vegas, NV, for the Respondent

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) on April 16, 2007[1] and an amended charge filed on June 15, the Regional Director for Region 4, National Labor Relations Board (the Board), issued a complaint on June 27, alleging that Bally's Park Place, Inc., d/b/a Bally's Atlantic City (Respondent), had committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Philadelphia, Pennsylvania, on January 22 and February 20, 2008, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs filed on behalf of the General Counsel and Respondent have been given due consideration. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following

[1] All dates are in 2007 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

Respondent is a corporation engaged in the operation of a casino in Atlantic City, New Jersey. During the 12 months preceding June 2007, in conducting its business operations, Respondent received gross revenues in excess of $500,000 and purchased and received at its Atlantic City casino goods valued in excess of $5,000 directly from points outside the State of New Jersey. Respondent admits, and I find, that at all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union was a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Section 8(a)(1) Allegations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act on three occasions when supervisors told an employee that he could not talk about the Union on the casino floor and on another occasion when a supervisor solicited employees' complaints and promised them increased benefits and improved conditions of employment if they refrained from supporting the Union.

Jose Justiniano was employed by Respondent as a table game dealer at Bally's Atlantic City casino from June 2000 until he was terminated on April 9, 2007. He testified that he learned that the Union was attempting to organize dealers in various Atlantic City casinos in November 2006. He attended numerous meetings held by the Union, became a supporter of the Union, and signed an authorization card. He spoke to other Bally's employees on a daily basis about the need for representation by the Union, in the employees' lounge, in the cafeteria, and as they were coming and going to work. He appeared in a DVD prepared and distributed by the Union to all dealers in Atlantic City.

Dealers at Bally's casino are assigned to work games in varying numbers, depending on the nature of the game. Blackjack for example requires only a single dealer, while craps has three dealers as well as two supervisors, a "floor person" and a "pit boss." A game in which customers are present and playing is referred to as a "live game," while a "dead game" is one in which no customers are present and playing the game. The evidence establishes that it was common practice for dealers working on a dead game to carry on social conversations with other dealers and/or supervisors and that there were no limitations on the subjects they could discuss.

Justiniano testified that during January 2007 he was working a crap table and during a dead game he had a conversation with another dealer named Camille. They talked about the UAW organizing effort at the Hilton Casino, saying, that it was doing well, that a lot of cards had been signed, and that an election was due soon. Floor person Brian Hinchey told them that they were not allowed to talk about the Union on the casino floor. They stopped talking about union activity and changed to a different subject.

Justiniano testified that on March 19 he began work at 6:00 a.m. He was assigned to Pit 7, which was subsequently shut down, and he was moved to Pit 8 to relieve another dealer at about 6:40 a.m. At about 6:50 a.m., Justiniano told floor person Irina Grau that he was due for a

break in 10 minutes.[2] Grau told him that he could take a break at 7:20 a.m., when the person he had relieved was scheduled for a break, or he could take a 10-minute right away. Justiniano said that was unacceptable, as he was entitled to a 20-minute break, and wanted to have it. Grau said that he could "take it or leave it." Justiniano said he would "leave it and Grau said he should take his break at 7:20 a.m. Justiniano responded that if he had to take a late break, he would come back late from his break. Grau said that if he did she would write him up. Justiniano told her not to threaten him on a live game and Grau repeated that she would write him up. Justiniano told her that was why they needed a union, because people like her were always harassing and threatening people. Grau began yelling at him, saying, that he wasn't allowed to talk about "union" on the casino floor and that he could be "fired for talking about unions." A short while later, Justiniano was relieved by another dealer and told to report to supervisor Barbara Jolly at Pit 4. Jolly asked what had happened between him and Grau and he told her. Jolly said that he was "not allowed to talk about the Union on the casino floor whatsoever." On March 22, Justiniano was escorted to speak with shift manager Jeffery Hunter who asked him about the incident with Grau. Hunter told Justiniano he had acted unprofessionally and that if he had a similar problem with a floor person he should say nothing and report it to a pit boss. In discussing Justiniano's unprofessional conduct, Hunter said that Justiniano should not be talking about the Union on the casino floor. Hunter gave Justiniano a written warning for acting "in an unprofessional manner in front of patrons and fellow employees on a live game." The warning states that Justiniano should "never speak of company business in front of patrons."

Justiniano testified that in late March or early April while in the employee cafeteria he went over to talk to some Latino employees with whom he "always" sat, including, floor person Felicia Catala and a couple of dealers. During the conversation, Catala said that floor persons had just had a meeting with pit bosses and other "higher up management" in which the floor persons were asked "the best way we can satisfy dealers" so they would not join the Union. Justiniano told her there was nothing to do because "the damage is already done."

Analysis and Conclusions

Justiniano's detailed, credible, and uncontradicted testimony establishes that in January, when he discussed union activity with another dealer during a dead game, they were told by supervisor Brian Hinchey that they could not talk about union activity on the casino floor. There is no dispute that during dead games dealers are allowed to have social conversations with one another. Respondent argues that there was no violation because Justiniano was not prevented from discussing the Union as a result of Hinchey's statement and he was not disciplined for engaging in this conversation. In fact, Justiniano and the other dealer ceased conversing about union activity when told to do so by their supervisor. It is a violation of Section 8(a)(1) of the Act to prohibit employees from discussing union topics when they are permitted to talk about other nonwork-related matters while they are working. E.g., *ITT Industries*, 331 NLRB 4 (2000); *Rock-Tenn Co.*, 315 NLRB 670, 681-682 (1994); *Jennie-O Foods, Inc.*, 301 NLRB 305, 316 (1991). The Board uses an objective standard to determine whether an employer's action is coercive and a violation of the Act. The test is not whether the coercion succeeded but whether the employer engaged in conduct which may reasonably tend to interfere with the free exercise of employee rights under the Act. *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995).

[2] Dealers get a 20-minute break every hour.

The fact that the employees here complied with the supervisor's directive to stop talking about the Union shows that the statement was coercive. It may also explain why the employees were not disciplined for engaging in the conversation. I find that Hinchey's statement that the employees could not talk about the Union on the casino floor was unlawful.

The allegations involving Grau initially arose from a dispute about Justiniano's break time. An argument ensued between the two and Grau eventually threatened to discipline Justiniano. This prompted Justiniano's comment, that this was why the dealers needed a union, and Grau's response, that he was not allowed to talk about the Union on the casino floor and could be fired for doing so. Jolly, the next level of supervision, also told Justiniano he was not allowed to talk about the Union on the casino floor. A few days later, when shift manager Hunter discussed the written warning he gave Justiniano in connection with this incident, he said that Justiniano should not be talking about the Union on the casino floor. I accept Justiniano's credible descriptions of the conversations with Grau, Jolly, and Hunter. None of those supervisors was called as a witness at the hearing and Justiniano's testimony is uncontradicted.[3]

It appears that, regardless of whether Justiniano was right or wrong on the break issue, he may have acted in an unprofessional manner when he argued with Grau in front of customers on a live game. However, the issue here is not whether Justiniano acted unprofessionally but whether, under the circumstances, the statements of Grau, Jolly, and Hunter, that Justiniano could not talk about the Union on the casino floor and could be disciplined for doing so, violated the Act. While there is no credible evidence in this record that Justiniano made his comments about dealers needing a union to the customers at the game he was dealing, rather than to Grau, that is also irrelevant.[4] The supervisors' statements in issue involve a blanket prohibition against discussing union matters on the casino floor, which as discussed above, is coercive and unlawful under the circumstances presented here, as employees are permitted to discuss other nonwork-related subjects with one another on the casino floor. None of the supervisors purported to limit the prohibition on discussing union matters to live games or to discussions with customers. Consequently, their comments violated Section 8(a) (1) of the Act. [5]

---

[3] I do not credit the ex-parte, unsworn, hearsay statements in the record, which Grau and Jolly apparently gave to the employer about their conversations with Justiniano, or find them sufficient to discredit Justiniano's testimony at the hearing. Similarly, the written warning Hunter gave Justiniano makes no mention of any comment about the Union. Respondent gave no explanation for its failure to call these supervisors as witnesses and I find its reliance on such evidence leads to an adverse inference. Reliance on weaker evidence when purportedly stronger evidence is available warrants such an inference. *Jennie-O Foods*, 301 NLRB 305, 333 (1991). I find no merit in Respondent's argument that Justiniano's refusal to sign the written warning or to add any exculpatory comments about talking about the Union somehow undermines his credibility.

[4] Contrary to the assertion in Respondent's brief, Justiniano did not testify that he "spoke to customers on a live game regarding the union."

[5] I do not agree with Respondent's contention that in his testimony Justiniano admitted that Jolly told him "he could not talk about the Union on a live game." The referenced testimony, at Tr. 95, l. 25 – Tr. 96. l. 2, an answer to a single leading question, is ambiguous at best with no detail or context.

An employer interferes with employee rights and violates Section 8(a)(1) of the Act when it solicits grievances from employees during a union organizing campaign with a promise to correct grievances, increase benefits, or improve their terms and conditions of employment. *Triec, Inc.*, 300 NLRB 743,747 (1990). Justiniano's credible and uncontradicted testimony establishes that during a break floor person Catala told him and two other dealers that she had been in a meeting in which floor persons were asked by management officials how they could "satisfy dealers" so that they would not join the Union.[6] It is true, as Respondent points out, that Catala made a statement about what occurred at the meeting and did not ask the dealers any questions. However, under the circumstances, where Catala raised the subject and said that she was "very happy" about what occurred at the meeting, she was obviously seeking a response from the dealers, which in fact she got from Justiniano. While Catala did not specifically say that Respondent would remedy the dealers' grievances, when an employer undertakes to solicit employees' grievances during an organizational campaign, there is a "compelling inference" that it is implicitly promising to remedy those grievances and thereby influence the employees to vote against union representation. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999). That is exactly what Catala told the dealers the Respondent wanted to do. I find that Catala's comments violated the Act.

B. Section 8(a)(3) and (1) Allegations

Justiniano was terminated for allegedly violating a work rule requiring employees to be "honest and forthcoming in all communications." Specifically, he was accused of telling Respondent that he was taking leave pursuant to the Family and Medical Leave Act (FMLA) to care for his daughter but instead attended a Union rally during the time he was on such leave. The General Counsel asserts that Justiniano was terminated for engaging in union activity or, alternatively, because Respondent mistakenly believed that Justiniano had abused FMLA when he engaged in the protected activity of attending the Union rally.

As a part of its effort to organize dealers in Atlantic City, the Union conducted a rally at the Trump Plaza casino on March 31, the day of a representation election involving dealers employed there. The purpose of the rally was to show support for the dealers voting in that election as they arrived for or left after their shifts. It involved about 60 people carrying pro-Union signs who stood outside the entrance to the Trump Plaza which is located nearby Respondent's casino. The rally was to last from about 10:30 a.m. until about 12:15 p.m.[7] Justiniano testified that he arrived at the rally about 10:00 a.m. and stood across the street from the Trump Plaza carrying a pro-Union sign.

Justiniano has a 13-year old daughter who suffers from severe asthma which requires her to use a device for treatment every 4 hours during the day. He had previously taken FMLA leave to care for his daughter while employed by Respondent without any problems. On March 31, he was scheduled to work as a dealer from 12 noon to 8 p.m. At about 9 p.m. on March 30, his daughter's mother, Awilda Concepcion, with whom she lives, called Justiniano and asked him to care for their daughter at his residence on the following day and he agreed. At about 6

[6] Catala was not called as a witness. There is no evidence rebutting that such a meeting was held or establishing a past practice of Respondent soliciting employee grievances.

[7] According to Union organizer Thomas Ashton, that was the usual schedule for daytime rallies conducted by the Union at various casinos on the day an election was to be held and on other occasions.

a.m. on March 31, Justiniano called Bally's and left a message on an answering machine that he would be taking FMLA leave that day. He called back about 3 hours later and spoke to someone named Judy in the scheduling office who confirmed that his message had been received.

Justiniano testified that he went to the union rally outside the Trump Plaza at about 10:00 a.m. he left the rally at 11:30 or 12:00 noon. After leaving, he rode less than a mile to the Union hall with UAW representatives Tom Ashton, Ron Adams, Joe Robinson, and Cassandra Wade in Adams' vehicle. From there he went home, which is about one block away and arrived there at about 5 or 10 minutes after 12. His daughter was dropped off at about 12:30 and remained with him until about 5:30 or 6 p.m. when her mother picked her up. Shortly after he began work on April 9, he was told to go see Vice President of Table Games Michael May in his office. May escorted Justiniano to the office of Director of Operations Richard Tartaglio. Tartaglio asked Justiniano if he had called out on FMLA leave on March 31 to care for his daughter and Justiniano said that he had. Tartaglio asked if he had attended the Trump Plaza rally on that date and Justiniano said that he had. Tartaglio said he was not allowed to use FMLA leave to attend a rally and had abused FMLA. Justiniano said that he had attended the rally on his time not company time. May said that he should have come into work at noon and left at 12:15 to care for his daughter at 12:30. Tartaglio told Justiniano that he was suspended pending investigation and they would get back to him in a couple of days. On April 11, May called Justiniano and told him he was terminated. Justiniano subsequently received a termination notice in the mail.

Joseph Mangiaracina is employed by Respondent as a pit manager. He testified that, as he was driving to work at Bally's casino at 11:45 a.m. on March 31, he saw a crowd of people in front of the Trump Plaza. Among them was Justiniano holding a union sign. When he arrived at his work area, he encountered May who asked him if he had spoken to Justiniano about an incident that had happened the day before. May had observed Justiniano, who was on a dead game talking to another dealer on a live game. May had told Mangiaracina to tell him that he was not supposed to do that. Mangiaracina told May that he had not had a chance to talk to Justiniano about the incident but that he had just seen him in front of the Trump Plaza holding a UAW sign. May told him that Justiniano had called off on FMLA leave that day.

May testified that on March 30 he had seen Justiniano speaking to another dealer who was working a live game.[8] He told Mangiaracina to speak to Justiniano about this. When he saw Mangiaracina heading to his pit on March 31, he asked if Mangiaracina had spoken to Justiniano about talking on a live game. Mangiaracina responded that he had not had a chance to do so and also said that he had seen Justiniano out in front of the Trump Plaza with a UAW sign. May told Mangiaracina that Justiniano had called in for FMLA leave that day.

May said he undertook to investigate whether Justiniano had used FMLA leave in order to be present in front of the Trump Plaza on March 31. On April 9, he escorted Justiniano to Tartaglio's office where Tartaglio asked Justiniano if he understood what FMLA leave is for and what the law was. Justiniano responded that he did. Tartaglio said that Justiniano had been seen at the rally outside the Trump Plaza at quarter to 12. Justiniano said that he was at the rally until it ended at about 12:20 p.m. and then went to take care of his daughter. Tartaglio told Justiniano that he was suspended for abusing the FMLA policy and that they would make a

[8] Dealers are not supposed to speak to one another on a live game since it may distract them from taking care of the customers on the game.

decision and let him know what the decision was. May and Tartaglio discussed that Justiniano had misused FMLA leave, that every employee who had been found to have abused FMLA had been terminated, and that they should be consistent in how this problem was handled. May subsequently telephoned Justiniano and told him he was terminated.

Tartaglio testified similarly that when he asked Justiniano what time he left the union rally, his response was 12:20. He said that he considered that the critical question and that, if Justiniano had said that he left the rally at any time prior to the start of his shift at 12 noon, he would not have been subject to disciplinary action. However, since Justiniano had requested FMLA leave to care for his daughter and had used it for a different purpose, attending the union rally, albeit, for only 20 minutes, he determined that Justiniano should be terminated. Both May and Tartaglio denied that May told Justiniano he should have come into work on March 31 and left at 12:15 to care for his daughter.

Analysis and Conclusions

The complaint alleges that Justiniano was terminated because he supported and assisted the Union, specifically, for attending the rally on March 31, and to discourage employees from engaging in such activities in violation of Section 8(a)(3) and (1) of the Act. Respondent asserts that Justiniano was terminated for violating its strict policy prohibiting employees from abusing FMLA, by using leave provided under that statute for unrelated purposes.

In cases where an employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) enf'd 662 F. 2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must persuade the Board that animus toward protected activity on the part of employees was a substantial or motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the employees' part. *Sears, Roebuck Co.*, 337 NLRB 443 (2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The General Counsel's initial burden is met by proof of protected activity, employer knowledge of that activity, and employer animus toward it. *W.R. Case & Sons Cutlery Co.*, 307 NLRB 1457, 1463 (1992).

There is no dispute that at the time of Justiniano's discharge Respondent was aware that the Union was attempting to organize its employees as a part of an effort to organize dealers at casinos throughout Atlantic City. There is also no dispute that it was aware of Justiniano's support for the Union as his discharge was a direct result of Respondent's learning that he was attending a pro-Union rally on March 31.[9] Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn therefrom. E.g., *Abbey Transportation Services*, 284 NLRB 698, 701 (1987); *FPC Moldings, Inc. v. NLRB*, 64 F. 3d 935, 9942 (4th Cir. 1994); *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966). The timing of an employer's action can be persuasive evidence of its motivation. *Masland Industries*, 311 NLRB 184, 197 (1993);

[9] Knowledge of the pro-Union statements by Justiniano which led to the Section 8(a)(1) violations found herein by its supervisors is also imputable to Respondent. *Glasforms, Inc.*, 339 NLRB 1108, 1118 (2003).

Limestone Apparel Corp., 255 NLRB 722, 736 (1981). Justiniano was discharged shortly after he was observed attending the union rally. The violations of Section 8(a)(1) found herein constitute evidence of animus on Respondent's part. *Farm Fresh, Inc*., 301 NLRB 907 (1991). Accordingly, I find that the General Counsel has established a prima facie case that the discharge of Justiniano was discriminatory.

I also find that Respondent has established that it would have discharged Justiniano even in the absence of the union activity on his part. This issue turns on when Justiniano left the union rally on March 31. Prior to the April 9, Respondent knew only that Justiniano was at the rally at 11:45 a.m., based on the report by Mangiaracina. The credible and mutually corroborative testimony of May and Tartaglio was that, at the meeting in Tartaglio's office on April 9, Tartaglio told Justiniano he had been seen at the union rally at 11:45 a.m. and asked him what time he left. Justiniano responded that he left the rally at 12:20 p.m. Based on that information, they concluded that Justiniano was at the rally 20 minutes after his shift was to have started that day and meant that he had spent 20 minutes of FMLA leave time attending the rally.

At the hearing, Justiniano first testified that he left the rally "around 11:30 or 12:00 o'clock" and got home 5 to 10 minutes later. He also said that, on April 9 when Tartaglio asked him what time he was at the rally, his response was "in the morning time." Union representatives Ashton and Robinson, with whom Justiniano rode to and from the rally, testified that they and Justiniano left the rally at around 11:45 a.m. According to Ashton, this type of rally usually runs until 12:15 p.m., after the grave shift comes out of the casino. He said that on March 31 they left "a little bit early" because Justiniano had to get home.

Having observed the witnesses and considering all of the evidence, I credit the detailed, consistent testimony of Mangiaracina, May, and Tartaglio. Mangiaracina said that he was sure of the time that he observed Justiniano at the rally as he was running late that morning and was looking at the clock on his dashboard of his vehicle. He said that at 11:45, he observed Justiniano at the rally holding a UAW sign. The testimony of Ashton and Robinson appeared contrived to support Justiniano. Neither was precise about the time they arrived at or left the rally and there does not appear to be any reason why they would have a specific recollection of those times. Ashton's direct testimony that they left the rally because Justiniano had to go home appeared to be an afterthought. Justiniano's testimony about when he arrived at and left the rally was no more precise. He said they arrived at 10:00 a.m., a half-hour earlier than Ashton and could not pinpoint when they left.

Justiniano's testimony about what took place during the meeting with May and Tartaglio on April 9 was vague and inconsistent.[10] He first testified that there was a discussion about FMLA and that he was accused of taking FMLA leave to attend the rally, which he denied, saying, that he attended the rally on his own time. After hearing the testimony of May and Tartaglio that he told them he left the rally at 12:20, he testified on rebuttal that he was asked what time he left and he answered "around 11:30 to 11:45." As noted above, his original testimony was that he left "around 11:30 to 12:00 o'clock." Although I credit his detailed testimony about the incidents with Hinchey, Grau, Jolly, and Catala, there was no credible testimony to the contrary. It is well-settled that crediting a part of a witness' testimony does not preclude the trier of fact from not crediting other parts. E.g., *PBA, Inc.*, 270 NLRB 998 fn. 7

[10] I did not believe his self-serving claim that May told him he should have come to work on March 31 for 15 minutes and then gone home on leave, which appeared designed to portray May and Respondent's FMLA policy as unreasonable.

(1984); *Maxwell's Plum*, 265 NLRB 211, 216 fn. 14 (1981). Here, the pertinent contradictory testimony by May and Tartaglio was consistent and credible and establishes that Justiniano admitted that he was at the rally for 20 minutes after his FMLA leave had begun. The General Counsel's attacks on the credibility of May and Tartaglio, based on alleged inconsistency because Tartaglio said Justiniano did not say that he had cared for his daughter on March 31, are not persuasive. The issue during the April 9 meeting was not whether Justiniano had cared for his daughter at some time on March 31, a legitimate use of FMLA leave, but whether he was at the union rally after the start of his shift while he was on such leave. His admission that he was at the rally until 12:20 (without his daughter) established that he had used a portion of the FMLA leave improperly.

Respondent has established that it has long had a zero tolerance policy with respect to employees who are found to have abused FMLA leave by doing something other than for what the leave was requested while on such leave, even for a relatively brief period. Its consistent policy and practice has been to discharge anyone found to have abused such leave. The evidence shows that Respondent has terminated an employee found to have abused FMLA leave by claiming it in order to arrive at work 45 minutes late when in fact she was using the time to work at another casino. Another employee was terminated for claiming such leave in order to leave work early work because she was ill when in fact she left to go to work at another casino. An employee who claimed such leave in order to provide care for his sick wife was terminated after Respondent found out he used the time to operate a bed and breakfast business at his residence and that his wife did not need constant care. Two employees were terminated for claiming such leave in order to operate a canoe rental business. The seriousness of Respondent's concern over abuse of FMLA leave is demonstrated by the credible testimony of May and Tartaglio and by evidence that it has spent thousands of dollars to investigate cases of suspected abuse by its employees, in some cases using private detectives to investigate them.

I find that Respondent has established that Justiniano abused the FMLA leave he had requested to care for his daughter by using at least 20 minutes of such leave to attend the UAW rally on March 31.[11] I also find that it has established that it terminated Justiniano because of that abuse in accordance with an established, nondiscriminatory policy and not because of his support for the Union. While Justiniano's attendance at the Union rally while on FMLA leave obviously was the reason for his discharge, under these circumstances, I find that his activity was outside the protection of the Act. See *NACCO Materials Handling Group*, 331 NLRB 1245 (2000). I shall recommend that this allegation be dismissed.

The General Counsel argues in the alternative, citing *NLRB v, Burnup & Sims, Inc.*, 370 U.S. 21 (1964), that even if Justiniano's discharge was not discriminatory and based on Respondent's union animus, it violated Section 8(a)(1) of the Act because even if it had a good faith belief that Justiniano abused FMLA leave by attending the UAW rally, it was mistaken. I find this argument fails here because Justiniano did in fact abuse FMLA leave by using a portion of it to attend the rally and not for the reason he requested it, to care for his daughter. I find that *Gulf & Western Mfg. Co.*, 232 NLRB 61 (1977), cited by the General Counsel, is distinguishable although, perhaps, subtlely. There, an employee called off work because of an asthma attack and later the same day felt well enough to be driven to an NLRB regional office to file a charge against the employer. The employer suspended the employee because it believed

[11] There is no evidence that Respondent based its decision to terminate Justiniano to any extent on the fact that he used less than the 8 hours of FMLA leave he had requested while actually involved in caring for his daughter.

he had falsified the reason for his absence from work. Citing *Burnup & Sims*, the Board found a violation, concluding, that the employer's good faith but mistaken belief that the employee had lied about his physical condition. Here, Respondent's belief that Justiniano had abused FMLA leave was not mistaken. He admitted that he had attended the Union rally and was there for at least 20 minutes while he was on the FMLA leave he had requested to care for his daughter. According to the certificate in the record (GC Ex. 10), to care for his daughter because of her "serious health condition" was the only reason Justiniano was authorized to take FMLA leave in the first place. He clearly was not doing that while at the rally. Unlike the employer in *Gulf & Western*, Respondent did not discharge Justiniano because it mistakenly believed he had lied about the reason he requested FMLA leave. It discharged him because he used that leave for a purpose other than for what he was permitted to use it. In doing so, Justiniano abused FMLA leave and he was disciplined in accordance with Respondent's long-standing policy. I shall recommend that this allegation be dismissed.

Conclusions of Law

1. Respondent, Bally's Park Place, Inc., d/b/a Bally's Atlantic City, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union was a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by telling employees that they could not talk about the Union or union matters on the casino floor and by soliciting grievances from employees and promising to remedy those grievances in order to dissuade them from supporting the Union.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. Respondent did not engage in unfair labor practices alleged in the complaint not specifically found herein.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[12]

The Respondent, Bally's Park Place, Inc., d/b/a Bally's Atlantic City, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Telling employees that they that they cannot talk about the Union or union matters on the casino floor.

(b) Soliciting grievances from employees and promising to remedy those grievances in order to dissuade them from supporting the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2007.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. August 21, 2008

_____
Richard A. Scully
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell our employees that they cannot talk about International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union on the casino floor.

WE WILL NOT solicit grievances from our employees and promise to remedy those grievances in order to dissuade them from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BALLY'S PARK PLACE, INC.
d/b/a BALLY'S ATLANTIC CITY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106-4404
Hours: 8:30 a.m. to 5 p.m.
215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.